United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of service

74-2124

To be argued by
PAUL B. BERGMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2124

UNITED STATES OF AMERICA,
Appellee,

—against—

JOSEPH MAURO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Joseph M. Mauro appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered July 26, 1974, convicting him under an indictment charging him with (1) conspiracy to deal in counterfeit money (count four, T. 18, U.S.C. § 371); (2) possession of 500 counterfeit $10 Federal Reserve Notes (count one; T. 18, U.S.C. § 472); and (3) the transfer of the same 500 counterfeit notes (count two; T. 18, U.S.C. § 473). Appellant was acquitted of count three in the indictment which charged him with a separate transaction involving the alleged transfer of ten counterfeit notes.* Appellant was sentenced to two con-

* The within indictment (72 Cr. 858) was consolidated for trial with an indictment (72 Cr. 857) charging appellant with extortion in his attempts to collect a loanshark debt owed to him by one, Louis Stoppiello, in violation of Title 18, U.S.C., § 894(a). (See Memorandum and Order of Judge Orrin G. Judd, January 23, 1974; Government's Motion to Consolidate, January 17, 1974; Government's Appendix, A. 6, A. 1). Appellant was acquitted of the extortion charges.

current prison terms of two years on each counts two and four and to a suspended sentence on the conspiracy count with a two year probationary term to commence following the expiration of the prison term. Appellant's entire sentence was ordered to run consecutively to a two and a half year prison sentence previously imposed in the Southern District of New York on January 30, 1974 (Ward, *J.*).* Appellant is presently incarcerated under the Southern District conviction.

On this appeal, appellant's sole claim relates to the introduction in evidence of five counterfeit ten dollar bills found in the steering column of his automobile. That counterfeit money was found some two months after appellant's car had been seized by United States Secret Service Agents and while the car was in the custody of the United States Bureau of Customs pursuant to forfeiture proceedings under Title 18, United States Code, Sections 781 and 782. Appellant claims that his motion in the trial court, made for the first time in the course of the trial, to suppress that evidence was timely and, moreover, should have been granted by the District Court. Appellant does not challenge the sufficiency of the evidence.

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* In the Southern District case (73 Cr. 489), appellant was convicted of conspiracy and possession of stolen cashiers' checks in violation of Title 18, U.S.C., §§ 371 and 2113(c) (see Indictment, Government's Appendix, A. 177). His conviction was affirmed by this Court in an opinion dated June 26, 1974. (*United States* v. *Mauro*, 2d Cir. Slip. Opinions, 4451). A petition for a writ of certiorari was filed in the Supreme Court on July 25, 1974 under docket number 74-9 and denied on October 29, 1974.

Statement of the Case

A. Introduction and Summary

In the summer of 1970, Louis J. Stoppiello,* recently released from prison, needed money. Appellant, a loan shark, loaned money to Stoppiello and continued to do so for about a year. By the fall of 1971, however, Stoppiello's combined principal and interest debt to appellant was in excess of $2,000. To aid Stoppiello (who was entirely willing) appellant gave him counterfeit money to sell to third persons. Eventually, through an introduction by an informant, Sal Seminara, one of those third persons turned out to be an undercover Secret Service Agent named Michael Reilly. Thus, following negotiations between Stoppiello and Reilly for the sale of $5,000 in counterfeit money, it came about that on January 4, 1972, Stoppiello, appellant and friend of appellant's (Leonard Bilz) were arrested. That arrest came about just after the $5,000 in counterfeit money was transferred to Agent Reilly in an automobile by the informant, Seminara. Stoppiello was arrested, as well as appellant, who was seated with Bilz in his car not more than 40 feet away from the scene of the transaction. Appellant's automobile, a Ford Mustang, was also seized.

Immediately following his arrest, Stoppiello willingly imparted information to the agents but refused to testify against appellant, who had not negotiated directly with Reilly. Thereafter, the complaint against appellant and Bilz was dismissed and Stoppiello alone was indicted. Appellant's automobile was retained by the Bureau of Customs.

In early March, not yet willing to testify but still willing to impart information, Stoppiello advised another Secret Service Agent, John Viggiano, that appellant had a

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* Stoppiello was the main Government witness.

small reserve of counterfeit money in the steering column of his car. Based upon that information, Agent Viggiano went to the vehicle and there found, secreted in the steering column, five counterfeit $10 bills. Shortly thereafter, the vehicle was returned to appellant.

In June of 1972, following his guilty plea (but prior to sentencing) and still in substantial debt (along with his wife, Patricia) to appellant, Stoppiello agreed to permit agents of the Federal Bureau of Investigation to place an electronic transmitting device on his person for the purpose of recording conversations with appellant concerning the debt. Subsequently, in June and July, 1972, three conversations between Stoppiello and appellant were recorded and eventually transcribed. The last of those conversations was on July 12, 1972. On the following day, the Grand Jury returned two indictments against appellant involving counterfeiting and extortion (based upon the taped conversations). That evening, appellant was arrested by FBI agents.*

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* In the following recounting of the facts of this case, this brief will cite the appropriate page references in the trial transcript and to the exhibits marked during the course of the trial, some of which have been reproduced in the Government's Appendix. In addition, appropriate references will be made to the transcripts of appellant's conversations with the witness Stoppiello which have also been reproduced in the Government's Appendix.

A word about the transcripts of the conversations: Stoppiello had lengthy conversations with appellant on three separate dates; June 15, June 28 and July 12, 1972. Those conversations were fully transcribed and, in their entirety, were marked as Government Exhibit 8 (See Transcript of February 25, 1974, p. A. 22; Government's Appendix, A. 167). Exhibit 8, which has been fully reproduced in the Government's Appendix, beginning at page A. 55, was paginated from 1 to 90 and references herein will be made to the original pagination of Exhibit 8 with the prefix "T" rather than to the appendix pages. For the Court's convenience, it will be noted that the

[Footnote continued on following page]

B. The Testimony

In June, 1970, Louis Stoppiello, following his release from prison, was introduced to appellant for the purpose of borrowing $100 (23). Stoppiello had just finished serving a three year prison sentence for possession of drugs. At the time, he was married with four children and his sole income was $539 a month as a veteran's disability payment. His wife, Patricia, earned some money as a registered nurse (20-21). Appellant agreed to loan Stoppiello the money with the understanding that the interest on the loan would be $15 a week until repaid. It was understood that a missed interest payment would be added onto the principal of the debt and that the interest—or "vigorish"—would be computed on the new figure (25-29).

By Christmas of 1970, as a result of further loans and missed interest payments, Stoppiello owed appellant between $600 and $700 (38). By the fall of 1971, Louis Stoppiello owed his creditor in excess of $2,300, although Stoppiello estimated that he had received no more than $1,300 "actual cash" from Mauro during this period. As a result, Mauro refused to lend Stoppiello any more money (41-42, T. 61).* Throughout the fall of 1971, Mauro and

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conversation of June 15 runs from T. 1 to T. 56; the June 28 conversation from T. 57 to T. 83; and finally, the July 12 conversation from T. 84 to T. 90. Finally, while the transcripts were never used by the jury, the tapes of the conversations were played during the trial and replayed time and again during the deliberations of the jury. At the conclusion of the trial, Judge Mishler remarked, implicitly, that the transcripts were accurate (1244, 1246). The Court will note, finally, that the trial transcript contains the Court Reporters' transcription of the tapes as they were being played in Court. It is the Government's recollection that, in some instances, the Court Reporters used the transcript as an aid. Such use was with the permission of Judge Mishler (126).

* Stoppiello, unknown to appellant, was borrowing money from him through friends. One of Stoppiello's friends who borrowed money from appellant was Sal Seminara. Seminara, however, did not repay the loans (43-44).

Stoppiello discussed ways for Stoppiello to satisfy his debt and in October, 1971, appellant and Stoppiello were making plans for dealing in counterfeit money. By late October, it was understood that Stoppiello would sell $10 denomination counterfeit bills for appellant (54). The bills were supplied and the price was set by appellant at $3 per counterfeit $10 bill, with a discount for purchases above $10,000. Stoppiello estimated that he had received more than $200 in counterfeit from appellant during October and November of 1971 (57-60). According to appellant, Stoppiello owed him $146 from the sale of those bills (T. 11).

By December of that year appellant was preparing to receive a new issue of counterfeit bills of higher quality even though appellant still had $80,000 of the poorer quality counterfeit in his possession (62). On December 1, appellant gave Stoppiello ten of the newly printed bills as samples and on the same day, Stoppiello entered the Veteran's Administration Hospital in Brooklyn for treatment (63).

On December 10, while still confined to the hospital, Stoppiello's friend, Sal Seminara, introduced him to Michael Reilly,* an undercover agent for the Secret Service.** After a perfunctory exchange of pleasantries and assurances of quality, Stoppiello sold Reilly eight of the counterfeit $10 bills for $24 (63-64, 67-68, 549-550). Stoppiello told Agent Reilly that he could obtain larger quantities of the bills in amounts ranging from $5,000 to $10,000 but that the price would have to be set by his supplier, "Joe" (555-556). Stoppiello then gave Agent Reilly his telephone number at the hospital and Reilly left

* Agent Reilly was introduced as "Mickey" and is referred to by that name in the transcribed conversations between appellant and Stoppiello, see e.g., T. 19, T. 28, T. 88.

** Seminara had gone to the Secret Service on December 3 (544-545, see also; Government's Exhibit 25, Government's Appendix, A. 9).

with Seminara (556). Thereafter, in a subsequent telephone conversation, Stoppiello told Reilly that he had spoken with "Joe" and that the bulk price per $100 worth of counterfeit would be $27 (558)*.

Stoppiello was subsequently released from the hospital on December 17 and on December 30 met Reilly at a location on Bay Parkway, Brooklyn, where he delivered two more counterfeit bills (559-560). Within a day or two of that meeting, Stoppiello arranged to sell Reilly $5,000 worth of the counterfeit $10 bills (565). A meeting, therefore, was arranged for 11:00 A.M. on January 4, 1972 at Bay Parkway and 72nd Street (566).

On the morning of January 4, at about 10:00 A.M., Stoppiello met with appellant and appellant's friend, Lenny Bilz, at Anton's Luncheonette. The three men discussed the impending transaction. In his testimony, Stoppiello described their conversation as follows:

> Yes, there was a discussion that, well, they were a little leery of this fellow Mickey—and Sal. And there was a moment, maybe we ought to put in like fake paper, you know, and give them—give them fake paper for money, and then if they were to—if they were to—if they were the cops, you know, then they could prove that it wasn't—— (78).**

When Reilly failed to show at eleven o'clock, Stoppiello promptly called him and a new meeting time was set for 2:00 P.M. the same day (79). Stoppiello then walked over

* It appears that, whereas Stoppiello was telling Agent Reilly that the price per $100 would be $27, he had, in fact, been told by appellant to sell quantities of $5,000 or more at $25 per $100 (71).

** Prior to January 4, Stoppiello had told appellant that he had been introduced to "Mickey" by Sal Seminara (78). Appellant recounted his suspicions of the impending sale during the June 15 conversation with Stoppiello (T. 20-T. 22).

to Anton's to inform appellant and Bilz of the delay (79). Thereafter, appellant gave Stoppiello his car keys, told him where the counterfeit was concealed and told Stoppiello that he would not "pass" the counterfeit (80). Stoppiello then went to appellant's car, a green Mustang, and retrieved the bills which, as described by appellant, were "on the back seat in between the magazines in a brown paper bag" (82-83). Stoppiello then carried the bills a short distance to his apartment building and placed them in the basement (83-84).

Shortly after two o'clock, accompanied by Rick Zaino,* another Secret Service agent, Reilly arrived in an undercover vehicle. After a brief conversation with Reilly, Stoppiello and Seminara, who by then had arrived on the scene, returned to the basement of the apartment building to get the counterfeit (86-89, 566-570).

During the interval that Stoppiello and Seminara were gone, about a half an hour, Reilly pulled into a nearby gas station to telephone his office. Appellant and Bilz, who had since emerged from Anton's also pulled into the station in appellant's Mustang and watched Reilly closely (571-72, 611-617). When Reilly concluded his phone call, appellant got out of his car and strode towards him. As he walked by Reilly, appellant quickly frisked Reilly—"he put his hands on both sides of my waist" (573)—and then returned to his car. Appellant then parked his Mustang about 35 feet behind Reilly's undercover vehicle to oversee the transfer of the counterfeit (573-74, 617-620; Defendant's Exhibit B [a photograph]).

A short time later, Seminara and Stoppiello returned. At the last minute Stoppiello refused to be the one to physically hand over the counterfeit, so while Stoppiello looked on from a distance Seminara gave Reilly the $5,000

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* Mistakenly spelled "Sanno" in the transcript of trial.

in counterfeit (90-93, 575). At that point, Secret Service agents appeared, arrested appellant and Bilz and seized appellant's car. Simulated arrests were made of Reilly, Zaino and Seminara. Stoppiello, who left when he saw the arrests made, was arrested a few hours later at his apartment (94).

C. Proceedings Following The Arrest

On January 5, following his arrest and the seizure of his automobile, appellant, together with Stoppiello and Leonard Bilz, were arraigned before the Magistrate for the Eastern District of New York on a complaint charging them with having transferred the $5,000 worth of counterfeit money to Agent Reilly (see Complaint, Government's Appendix, A. 17).

In colloquy with the District Court, a colloquy had in connection with appellant's motion to suppress evidence (five counterfeit bills) taken from the steering column of his car in March, 1972, Government counsel explained that, while Stoppiello, following his arrest, had spoken freely with the agents concerning appellant's involvement, he had done so with the understanding that he would not testify (813-814; see also testimony of John Viggiano, 849). Government counsel explained that he had spoken personally with Stoppiello and his attorney in early February, 1972 and, once more, while willing to impart information, Stoppiello would not agree to testify. At that meeting, Stoppiello was told that he should expect to be indicted. As explained by Government counsel:

> "And then thereafter it was just a matter of Louis Stoppiello deciding in his own mind that having, I suppose, enough confidence in the United States Attorney's office, that he could testify in the Grand Jury safely against [appellant]" (813).

Stoppiello was subsequently indicted on February 10.* The complaint against appellant was dismissed on motion of the United States Attorney on February 15 (Government's Appendix, A. 19).** The complaint against Bilz had been dismissed in January. With respect to appellant's automobile, Government counsel explained that within two or three days of the arrest, Mr George Rosenbaum, counsel for appellant, telephoned and requested the return of the vehicle because appellant had his unemployment insurance books in the car and a "whole host of things" (811-812). Subsequently, appellant's counsel was advised that he would have to petition for the return of the vehicle.

On March 3, following his indictment, Stoppiello spoke with Agent Viggiano and told him that appellant kept counterfeit money in the steering column of the Mustang (839; see also Government's Exhibit 21; Government's Appendix, A. 15). Thereafter, Viggiano went to the garage where the vehicle was stored, pulled apart the steering column and found five counterfeit $10 bills, the serial numbers of which matched those counterfeit bills which Reilly had previously received from Stoppiello and Seminara (839-841, 846-848). In April, Stoppiello pleaded guilty to the second count in the indictment against him. His sentence was adjourned.

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* Stoppiello was indicted for the three transactions with Reilly: (1) the sale of the eight counterfeit bills on December 10, 1971, in the hospital; (2) the delivery of the two counterfeit bills on December 30; and (3) the delivery of the $5,000 in counterfeit bills on January 4, 1972 (see Indictment, E.D.N.Y., 72 Cr. 169; Government's Appendix, A. 20).

** Government counsel explained that "the dismissal of the complaint against [appellant] . . . was made more in consideration of the then newly enacted six month rule than anything else" and that "the dismissal of the complaint" was not "an indication by the United States Attorney's Office that there was no basis upon which the vehicle could not [sic] be forfeited" (810). The complaint against appellant was dismissed voluntarily and on the initiative of the Government (809). Appellant's bail had been a personal recognizance bond.

D. The Tapes

On June 15, 1972, a small transmitting device was placed on Stoppiello's person to record his bimonthly conversations with appellant concerning his and his wife's loan-shark debts. This procedure was repeated on June 28 and July 12 (723, 730, 732). While the most constant theme of their conversations (which also included Stoppiello's wife, Patricia) was the repayment of the money owed to appellant, there were several offshoots on that theme which were equally prominent. Thus, during the June 15 conversation, Stoppiello suggested further criminal ventures (T. 9-T. 11, T. 41) as a means of enabling him to repay appellant. In their subsequent conversations, an issue developed as to whether Stoppiello's debt should be forgotten because, as Stoppiello phrased it, he alone had "taken" the January "bust" and was facing a jail term (T. 16-T. 18, T. 74, T. 76). Throughout, however, appellant remained adamant and continued to assert his rights to repayment. Stoppiello was equally adamant in his refusal to repay. In the concluding conversation on July 12, appellant told Stoppiello that he had learned it was Stoppiello who had told the Secret Service about the counterfeit money in the steering column of his car. He advised Stoppiello, "That, the fact that I seen your name on a piece of paper, makes you dead. OK?" (T. 90). Throughout the conversations appellant continually implicated himself in the counterfeit money transactions involved in the indictment.

1. The June 15 Conversation

During their first recorded conversation appellant repeatedly pressured Stoppiello for money (T. 1-T. 9). Stoppiello suggested another counterfeit sale, this time with an acquaintance named "Ronny," as a way of paying off some of his debts (T. 9-T. 11). Reluctant ("I'm not working

that way anymore" [T. 10]) appellant recalled the January fiasco:

JM: Everytime I work with you I get burned Lou, everytime I work with you I get burned. When I gave you the tens I got busted, I lost money, you still owe me $146" (T. 11)[*].

* * * * *

JM: Everytime I give you a chance to do something, to make money [inaudible], it doesn't work out Lou and I end up losing money. That's why I'm not doing it anymore. I lost money on the money, money on the pills.

PS: [Patricia Stoppiello]: You mean the money that, that they picked up, confiscated?

JM: [inaudible] the money I was giving him is basically his. I'm not that [inaudible]. I gave him that money. Whatever happens to it after he gets it is his problem, but I'm taking the loss on that (T. 15-T. 16).

* * * * *

JM: I've tried to work something out with him, but any time I take a chance with him who gets hurt? Me (T. 25).

When Stoppiello raised the idea that some sort of accommodation should be worked out on the debt because he was quietly shouldering the entire weight of the counterfeiting charges, appellant offered some understanding:

JM: . . . You're they're scapegoat, understand? They got to come up with somebody. They couldn't get Bilz . . . They couldn't get enough on me, . . . (T. 52).

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* This was an apparent reference to the counterfeit money which Stoppiello had received from appellant in October and November (see also T. 71).

On the whole, however, appellant was not receptive to wiping away the more than $2,000 that Stoppiello owed him on the loans because of the loss he had sustained following the January 4 arrest:

JM: That bust cost me 6 thousand dollars, includes the total taken and what I had to get rid of. OK? Now if we're talking about partners that means you owe me 2 thousand . . . (T. 22).

* * * * *

JM: The person, the person I got this from, I had to pay for it. When I take them and they're out of his possession and I'm away from him, whatever happens is my problem (T. 22).

* * * * *

JM: I paid for them, after the bust (T. 23).

* * * * *

JM: Interest stops [inaudible]. The only time the loan is cleared is when it's paid or the lender dies. I'll take you to fifteen different people (T. 24).

When Stoppiello, however, suggested to appellant that he, Mauro, had not been indicted because of the lack of evidence, appellant replied: "OK, but that doesn't mean they leave it at that . . ." (T. 37). Appellant then described his experience following the January 4 arrest:

JM: Alright. That it was through you that everything was set up. I was involved, . . . (unintelligible) . . . was involved, you were involved. Somebody's got to know where it's coming from. Right? They took me aside half a dozen times. Look, we can't make any deals we, we can't promise you this, we can't promise you that. Just tell us where it's coming from. And I don't know where it's coming from. If I knew where

it was being printed I wouldn't even be in New York because the printing you can buy it from the printers for nothing and I'd go someplace where I'd be a millionaire. I don't know the man that prints it. I told you that before. Didn't I.

LS: Right.

JM: You introduced me to the guy who I can get them from to begin with. You know as much as I do. All I was doing was getting them from his partner. Now I don't know who his partner is getting them from. Do you know who Ralph is getting them from (T. 38).

When Stoppiello continued to suggest further counterfeit transactions, appellant offered this advice:

JM: And the further you stay away from it the better you are. They'll nail you to the cross if they can get through me to whoever I'm getting them from and then they're going to do things to him to find out where he's getting them from. Now they don't even have to go to me. You know where I'm getting them or I was getting them (T. 53).

2. The June 28 Conversation

Once again, Stoppiello urged appellant to forgive the debt because he had taken the "bust." Appellant disagreed:

JM: You didn't take it for me. The rap we got hit on, you're cleared on. You're getting hit for what you did in the hospital, alright? The one where the three of us were involved, out here, that's wiped out (T. 78).

In all events, appellant pointed out to Stoppiello that he, Stoppiello, also had an interest in the January 4 transaction:

JM: You were doing that for you too. Don't say me, you were doing it for me. You were doing it for yourself too, Lou (T. 68).

Moreover, according to appellant, the counterfeit money, once he had given it to Stoppiello, was no longer his:

JM: [Inaudible] Because you introduced me to the man, alright? And you know as well as I do I got it from his fucken partner. So just because I went and got it, it's mine? You introduced me to him (T. 74).

Finally, according to appellant, Stoppiello ". . . took stuff on consignment, you blew the stuff and never got it back" (T. 83). And then, alluding once more to Stoppiello's ill-fated dealings with Reilly: "You set up a meeting, you set up a meeting with another guy, you swore up and down was good. That caused a bust" (T. 83).

3. The July 12 Conversation

The July 12 meeting between appellant and Stoppiello continued the escalation. At appellant's direction, it was held in the hallway of Stoppiello's apartment building. Appellant told Stoppiello that he had seen a report at the Bureau of Customs which, under the signature of James Whitaker, stated that Stoppiello had told the Secret Service of the counterfeit bills hidden in the steering column (T. 85-T. 87).* Stoppiello protested his innocence, pointing to the fact that only he had been indicted. Appellant argued that Stoppiello had been implicated only in the earlier "hospital" transactions and not on the January 4 transaction: "You got yourself into that one. We all got into the other one. We got out of the other one" (T. 87) . . . "They didn't have enough evidence. They didn't have enough evidence on me, Lennie or you. They had to put it in there . . ." (T. 89).

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* Such a report, in fact, existed (See Government Exhibits 36 and 37, Government's Appendix, A. 28.

E. Pretrial Discovery Proceedings

On July 14, 1972—the day following his arrest on the indictments—appellant was arraigned before Judge Dooling and pleaded not guilty to both indictments. He was represented at that time by George Rosenbaum, Esq. Thereafter, in January of 1974, Aaron Schacher, Esq. replaced Mr. Rosenbaum as counsel. At a pretrial conference on January 4, 1974 before Judge Judd, Mr. Schacher informed the Court that he had been recently retained as counsel and that Mr. Rosenbaum had made no motions. Judge Judd then stated and the Assistant responded:

> The Court: I don't find it necessary, generally, to have a lot of motion practice. Mr. Bergman and the U.S. Attorney's office know what my practice is. It doesn't differ too much from other judges.
>
> The defendant's counsel is entitled to statements, to see any physical evidence that the Government has. I think in a case like this, Mr. Bergman will perhaps go beyond the requirements of Rule 16 and give you other information to properly determine what disposition to make.
>
> Mr. Bergman: If Mr. Schacher will favor me in a letter what matters he desires formally (Transcript of January 4, 1974, p. 5; Government's Appendix, A. 37).

Thereafter, on January 8, Mr. Schacher directed a letter to the United States Attorney in conformity with his prior discussions wtih the Assistant. That letter (Government Exhibit 2), which has been reproduced at page A. 42 of the Government's Appendix, did not request production or discovery of any item taken from appellant, although it did make extensive requests concerning the taped conversations and a separate request for the appellant's statements. On January 14 and in subsequent letters dated January

24 and February 14, the Government responded to counsel's discovery letter (See Government Exhibits 3, 5 and 7, Government's Appendix, A. 44, 49, 54). Enclosed within the first response was a full draft set of the transcripts prepared from the tape recordings (Government Exhibit 4) which, in the transcript for the July 12 conversation between appellant and Louis Stoppiello contained the following transcription in which "(IA)" means "inaudible":

JM: You know James Whitaker?
LS: Whitaker? Yeah.

JM: Don't bullshit (IA)
LS: Yeah, I saw his face.

JM: (IA) you informed on (IA) Alright?
LS: (IA)

JM: You informed on (IA)?
LS: I informed him?

JM: That's right.
LS: I don't even, I don't even know the man.

JM: You just said you knew him.
LS: I heard of him. I heard of him, through uh, you know the (IA), I heard of him.

JM: (IA)
LS: That's not so funny because uh from what I've heard and . . .

JM: From what I've read.
LS: You know everybody else went free and I got the indictment. So uh you figure that out, who. What about the guys that uh, you used subterfuge to set me up because you went free. Right? (IA) when you went downtown, when you went downtown . . .

JM: (IA) you name is on a piece of paper saying you told them that they were in the column.
LS: (IA) were in the column?

JM: In the column.
LS: I don't know this guy Whitaker. I heard of him though.

JM: I saw it, I read it.
LS: You read it.

JM: Bureau of Customs (IA)
LS: Bureau of Customs? What has that got to do with the Bureau of Customs?

JM: (IA)
LS: Heh?

JM: Three different penalties involved . . .
LS: (IA) penalties?

JM: . . . whatever the hell they are.
LS: Yeah.

JM: They got your whole name on them.
LS: And he said I told him?

JM: It says like (IA)
LS: I'll tell you what we do in a little while. We'll go down there together to Customs and see this guy. (IA)
LS: Because uh, uh, I don't even know what he looks like. I've heard of him.

JM: (IA) it's in black and white.
LS: I've heard of him.

JM: My lawyer too.
LS: Oh, your lawyer saw it.

JM: And I didn't believe him until I went down to get the car and . . .

LS: (IA) this guy Whitaker, to this guy Whitaker.
JM: I don't even know Whitaker. (IA) a lot of people say, Alright?

LS: I' I've heard of this guy Whitaker, but I heard he's a (IA) in the Secret Service. Yeah, but I've heard of him. But that's all. I've never met the man.

JM: Lou, it's too late (IA). The fact is uh (Government Exhibit 4; Government's Appendix, A. 46).*

On January 23, Government counsel spoke with defense counsel and advised that the tape recordings would be available for his listening (Government Exhibit 17; Government's Appendix, A. 145). Subsequently, on Saturday, January 26, defense counsel listened to the tapes in Government counsel's office. At that time, corrected transcripts of most of the conversations were provided counsel (Government Exhibit 6). Only slight changes were made in the above quoted portion of the transcript (See excerpt from Government Exhibit 6; Government's Appendix, A. 51).

F. The Motion To Suppress

On Monday, March 4, 1974, the third trial day and following the testimony of Stoppiello and Reilly, the Government called Agent Viggiano to the stand. He was sworn and before the Assistant could finish his first question ("Mr. Viggiano . . ."), counsel for appellant asked for a sidebar. Judge Mishler excused the jury and counsel then stated:

> "I may be overguessing, Judge, I don't know—is it my belief that Mr. Bergman will in some way make reference to the steering column of the car?" (624).

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* The foregoing draft transcript as well as the other pretrial documents were marked and explained, in part, during the proceedings on February 25, 1974, before the jury was sworn (See Transcript of February 25, 1974; Government's Appendix, A. 146). The three pages from Exhibit 4 (the draft transcript), quoted above, have been reproduced at page A. 46 of the Government's Appendix.

Following a brief colloquy as to an unrelated matter (625-627) counsel stated that:

> ". . . I make reference to the fact of the alleged finding of money in the steering wheel column of the car" (627).

Counsel went on to state that he wished to have testimony relating to Viggiano's search because of the "duration of time," "the time element," ". . . nobody knows who put that money there" (628-629). In response, Government counsel reserved his statement on the merits of the motion and protested its lateness (629). Counsel for appellant, however, stated that he had not known that "any bills were found in the steering wheel column . . ." (629) until he had received certain 3500 material following the completion of Stoppiello's testimony (629-630).*

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* The "3500 material" referred to by counsel (see also 642) was a report (Government Exhibit 21) prepared by Agent Viggiano concerning the March 3 conversation he had with Stoppiello and the subsequent search of appellant's car. In part, that report stated:

> On March 3, 1972, Stoppiello advised that Mauro had bragged to him about putting some counterefeit money under the scale in the prisoner's processing room. I explained to Stoppiello that Mauro seemed to be particularly anxious to have his automobile returned. Stoppiello, at this time, told me that the reason Mauro wanted his car back was because there were counterfeit notes concealed in the steering column. Stoppiello stated that this was told to him by Mauro.
>
> On the same date, I proceeded to Maxford's Garage on Varick Street, New York City, and conducted a search of the steering column of Mauro's car. Five counterfeit $10 FRNs, c. 4098, were found in the top portion of the steering column. These five counterfeit $10 FRNs, along with the three counterfeit $10 FRNs found under the scale, were sent to Special Investigations and Security Division on March 13, 1972 for a nin-hydrin examination (See Government's Appendix, A. 15-16).

On the merits of the motion, which, by then had evolved under the Court's guidance into an issue concerning the basis for the seizure of the vehicle, the Assistant stated the following:

> Mr. Bergman: I may make an offer of proof. My understanding is this, Joseph Mauro's car, when it was initially seized on the 4th of January, was not seized on the basis of any whim, but on the basis of information that had been supplied by the informant in the case, to the effect that Mr. Mauro was dealing in counterfeit money, and his car in one way or the other had been involved in the transportation of counterfeit money.
>
> Instead [sic], Soppiello [sic] when he met with Agent Reilly on the 10th in the hospital, told Reilly that his friend Joe, had gone on a recent hunting trip in New York and spent or passed 13 of these bills.
>
> What I am saying is this, aside from—— (634). [The offer of proof was not completed but continued the next day following the testimony of the witness, FBI Agent O'Connor, and a hearing with respect to statements made by appellant to O'Connor following his arrest in July, 1972 (see 642-752)]:
>
> * * * * *
>
> Now the government is prepared, if your Honor needs additional evidence as to the government's prior knowledge of Mauro's involvement, to produce witnesses showing that, first of all, when Sal Seminaro came to the agency on December 3rd he told them at that time that Louis Stoppiello's source was Joseph Mauro. So that prior to the sale on the 4th, the agents did know of an individual named Joseph Mauro, indeed there is a cross index as to a paper in the government's file, in the Secret Service file,

where Joseph Mauro was connected with some transactions in Oklahoma involving counterfeit money.

* * * * *

The car was being used, the proof of the car being used is that it was there and that Mauro, one of the persons suspected of being involved in this crime, was seated in the car not more than 30 feet behind the undercover vehicle observing the scene, and not more than five or ten minutes before Mauro had attempted to ascertain whether or not Reilly was carrying a weapon, and in fact once Reilly returned to the car, and this evidence hasn't been brought out yet, Seminaro, when he came back the second time—excuse me, when he spoke to Ronny [sic, "Mickey"] the first time, and this is what precipitated the phone call, he advised him that Mauro was in the area, that he was carrying a gun and to watch out: That was the purpose of Reilly's phone call, which was to headquarters to inform them of this news that he had just learned.

Now, there had to be a reason why the agents arrested Joseph Mauro on January 4th, and I submit that was the reason, and that, coupled with the prior knowledge they had of Mauro's involvement and his presence at the scene a short distance from the undercover vehicle observing the events—— (761-762).

At a later point during colloquy the Government told the Court that it was "prepared to go forward with its witnesses . . . to establish the probable cause for the seizure of the vehicle . . ." (765). Then, following a brief colloquy concerning the retention of the automobile, the following took place:

The Court: Are you prepared to offer testimony on what evidence the government had, aside from what has already appeared in the record.

Mr. Bergman: Yes, your Honor, I'm prepared right now.

The Court: And the reason for the seizure.

Mr. Bergman: Yes, your Honor.

Mr. Schacher: May I say one thing, your Honor.

The Court: Yes.

I have got to say one thing about what you have done to date, Mr. Schacher:

It may very well be that you waived your right to suppress by failing to make the motion, and I will take evidence on that. Now I don't know, of course, when the bills were seized, but Mr. Mauro certainly knew about them—is that right—in March.

Mr. Bergman: From the car?

Mr. Schacher: Your Honor, he never knew about these things.

The Court: He never knew the bills were there.

Mr. Schacher: No, your Honor, he never knew they were seized.

Mr. Bergman: If your Honor will listen to the last tape which is in this case——

The Court: I listened to all the tapes and about the steering column and that he had to pay $150 to repair the car, but there is nothing in that evidence as far as I recall that says the money, the money was in the steering wheel (765-767).

* * * * *

The Court: I want to call another thing to your attention:

If the government were aware of your objection, they would have made application to have the hear-

ing first and not to pick a jury, and thus to afford them the opportunity of appeal from any adverse ruling.

Mr. Schacher: Your Honor, I didn't know about these moneys in the steering wheel column.

The Court: I don't know about that, I'm not so sure.

Mr. Schacher: I will take an oath on that.

The Court: I am not so sure, maybe you didn't know, but I think the other question is whether you had the opportunity to learn and the other question is whether your client knew.

It is almost inconceivable that he did not know there was counterfeit money in the steering column of his car, his car, a car owned by him and he didn't know about it.

Mr. Schacher: Your Honor, if I had been made aware of it, I think I know enough about the search and seizure law to make a proper application.

The Court: I do know this, he knew his steering column was disassembled, he knew he had to pay $150 to repair it [See T. 40-T. 41].

Mr. Schacher: He wasn't present when it was being broken up, he had to put the car in working order, sir, and that doesn't mean to say that he knew there was counterfeit money there, sir.

The Court: You don't think that I can reasonably infer that if counterfeit money were found in that steering wheel of his car that he would know about it, that I can't infer that.

Mr. Schacher: Two months after it is taken, your Honor.

The Court: Six years.

Mr. Schacher: He didn't know about it, sir, no, sir.

The Court: Maybe you know more than I do, I'm talking about on the record——

Mr. Schacher: I wish I did know, sir, if I had known about this factual situation I would have taken a proper step.

The Court: You make a flat statement that your client didn't know that there was counterfeit money in his steering wheel, but——

Mr. Schacher: Because I asked him in Court when this issue arose, I asked him and he said he didn't know.

The Court: He said he didn't know.

Mr. Schacher: That is correct.

The Court: And that is what you base it on.

Mr. Schacher: How else can I base it, your Honor.

The Court: On the circumstantial evidence that there were counterfeit bills found in the steering wheel and that he owned the car at that time.

Mr. Schacher: The car wasn't in his possession for two whole months, your Honor——

The Court: The other inference is that it was never in the car and that they either planted it there or said it was there.

Mr. Schacher: Your Honor, according to Stoppiello's testimony he had testified in this Courtroom here that he had been instrumental in framing certain people with the help of officers, your Honor, and I am not saying it happened here but the inference can be made quite clear that he wasn't——

The Court: You say Mr. Stoppiello planted ten bills in Mr. Mauro's car.

Mr. Schacher: I don't know, maybe they weren't there, maybe they were, sir, I have no way of knowing.

The Court: You have a great imagination, Mr. Schacher.

Mr. Schacher: Your Honor, if I had known of it you can be sure of one thing, I would have brought the motion on.

The Court: Well, I will hear the tapes again (768-771).

Shortly thereafter, two files from the United States Bureau of Customs concerning the seizure and forfeiture of appellant's vehicle were marked in evidence (Government Exhibits 36 and 37; Government's Appendix, A. 22). The matter was then held in abeyance pending the completion of the witness O'Connor's testimony (782-805). Then, following further argument on the motion and without any further testimony, the Court read into the record portions of the tape transcripts of July 12, 1972 (Exhibit 8) from page 85 to page 86 (816-817). After having finished reading the transcript, the following colloquy took place:

[The Court]: Is there any doubt that both the defendant and his lawyer, Mr. Rosenbaum knew that these bills were seized from the car?

Mr. Schacher: Well, your Honor, there is nothing that mentions bills in the car, your Honor.

The Court: Let me ask you what you think Mr. Mauro was referring to on page 85 when he says, "You told them that, they were in the column," what?

Mr. Schacher: The column of what, your Honor?

The Court: "Mr. Stoppiello: Were in the column?

"Mr. Mauro: Steering column."

Mr. Schacher: There is still nothing about bills, your Honor.

The Court: I know it did not say the counterfeit bills, as a matter of fact he did not say how many. He did not say I am talking about five counterfeit bills, he did not have to, they both know what they were talking about (817-818).

Thereafter, in quick succession, Judge Mishler stated that appellant "knew far in advance" that the Government would seek to use the steering column bills in its case (819); that he knew the bills had been seized (820); and, finally, that appellant's first lawyer, Mr. Rosenbaum knew that the bills had been seized (820).* Thereafter, amidst interruptions, Judge Mishler made the following ruling on the motion:

Mr. Mauro knew in 1972 that the Government had these bills. His lawyer knew in 1972 that the bills in all probability would be used in the trial of the case. It was a counterfeiting case (825).

* * * * *

Leave alone the argument on the question as to whether you waived your right to suppress under Rule 41-E (828).

The Court: I find the bills seized—what was the date of the seizure?

Mr. Bergman: March 3rd.

The Court: (Continuing)—March 3rd was a lawful seizure made in a lawful search.

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* Judge Mishler refrained from asking counsel if appellant had told him of the seizure (820).

I find that the Government lawfully seized the car in which the defendant was found at the time of arrest and that he had proof that this car was being used in transferring the 500 counterfeit bills to Mr. Stoppiello.

I find that the only real issue is whether the Government failed to proceed with the forfeiture procedure with undue delay. I believe that the owner has a right to petition for reclamation and the owner failed to do it until March 13—as I recall—April 4—

Mr. Bergman: March 13, your Honor.

The Court: I was right, the petition is dated March 13.

I find that this is an on-going investigation and the delay until the date of seizure was not an undue delay.

I find that the return of the car, the fact of the return of the car, is irrelevant. As a matter of fact, it might have even been imprudent but it was a decision to be made by the Bureau of Customs and it may very well be that the value of the car did not warrant the continued custody and the forfeiture procedure but, for whatever reason, it was solely within their discretion to return it and the fact of return does not prove that the car was not subject to forfeiture. As a matter of fact, the proof is overwhelming to the contrary. The Government had every right to forfeit this car.

* * * * *

There is a serious question as to whether the defendant proceeded properly or timely under Rule 41(e) of the Federal Rules of Criminal Procedure.

The defendant has 10 days to move, 10 days from the date of the filing of the indictment. His lawyer,

Mr. Rosenbaum, was in charge of the case at the time and was fully familiar with the seizure, knew the bills were seized, and had every reason to believe that the bills would be offered in evidence.

He failed to do it.

Mr. Schacher came into the case late, but again there was enough in the tapes that were played on or about January 24 to indicate that the bills were found in the steering column and in all probability would be used to support the Government's case.

I find that the defendant's motion in mid-trial, which incidentally would result in the forfeiture of the Government's right to appeal in the event of an adverse ruling, is untimely (829-831).

ARGUMENT

POINT I

The District Court properly denied appellant's motion to suppress, made on the third day of trial, where no reasonable explanation was given for the delay.

Citing such cases as *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *United States* v. *Curiale*, 414 F.2d 744 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969), appellant urges that the failure of his two successively retained attorneys to move, prior to trial, for the suppression of the five counterfeit $10 bills found in his automobile, should not be viewed as a "waiver of a fundamental right . . ." (Appellant's Brief, p. 32). At the very least, he contends, an evidentiary hearing was required to overcome what, in this situation, he has characterized as a "presumption against the waiver of 4th Amendment protection . . ." (*id.*). At such a hearing, it would be the Government's "burden of proof to produce evidence to rebut the presumption."

Appellant's argument is without merit. The cases he has cited, as well as the propositions he asserts, hang in mid-air. They have no relation to either the facts of this case or to the substantial body of case law which has focused upon the requirement that defendants must move, in advance of trial, for the suppression of evidence. In short, the issue with respect to the delay in this case is not "waiver" but, rather, whether Judge Mishler properly exercised his discretion in the light of appellant's unexcused failure to move for suppression, before trial, as required by law.*

In an unbroken line of decisions, this Court has consistently and repeatedly upheld district judges when they have refused to entertain, as a matter of discretion, suppression motions which were untimely made. *United States* v. *Ellis,* 461 F.2d 962, 969 (2d Cir. 1972); *United States* v. *Blackwood,* 456 F.2d 526, 529 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972); *United States* v. *Bennett,* 409 F.2d 888, 901 (2d Cir.), *rehearing denied,* 415 F.2d 1113, *cert. denied,* 396 U.S. 852 (1969); *United States* v. *Watts,* 319 F.2d 659, 660 (2d Cir. 1963); *United States* v. *Nicholas,* 319 F.2d 697, 698-699 (2d Cir.), *cert. denied,* 375 U.S. 933 (1963); *United States* v. *Di Donato,* 301 F.2d 383, 384 (2d Cir. 1962); *United States* v. *Montalvo,* 271 F.2d 922, 926 (2d Cir. 1959); *United States* v. *Volkell,* 251 F.2d 333, 336 (2d Cir.), *cert. denied,* 356 U.S. 962 (1958); *United States* v. *Romero,* 249 F.2d 371, 374 (2d Cir. 1957); *United States* v. *Sheba Bracelets, Inc.,* 248 F.2d 134, 143 (2d Cir.), *cert. denied,* 355 U.S. 904 (1957); *United States* v. *Chiepra,*

* In 1972, effective October 1, 1972, Rule 41, F. R. Crim. P., was amended to provide that motions to suppress evidence be brought under Rule 12. While the language in Rule 41(e), which previously had provided that the "motion shall be made before trial . . ." was deleted, it is clear that, under Rule 12, the same requirement obtains. See, *Davis* v. *United States,* 411 U.S. 233 (1973). The same was so at common law. See, *Segurola* v. *United States,* 275 U.S. 106, 111-112 (1927).

241 F.2d 635, 638 (2d Cir.), *cert. denied,* 353 U.S. 973 (1957); *United States* v. *Sansone,* 231 F.2d 887, 891-892 (2d Cir.), *cert. denied,* 351 U.S. 987 (1956); see also, *Rosen* v. *United States,* 293 F.2d 938, 941 (5th Cir. 1961), and cases cited therein; *cf., United States* v. *Weldon,* 384 F.2d 772, 775 (2d Cir. 1967).*

Indeed, research by counsel has failed to uncover any case decided by this Court in which a district judge has been found to have abused his discretion; a discretion which, as this Court has noted, must be measured along with "[t]he important policy of . . . avoiding the serious inconvenience to jurors from unnecessary disruptions of trial to deal with issues that could and should have been raised in advance," *United States* v. *Bennett, supra,* at 901, as well as the equally important Congressional policy, embodied in Title 28 U.S.C. § 3731, ¶ 2, of providing the government with the optimum of its appellate rights. *Cf. United States* v. *Nicholas, supra,* at 699.

The facts of this case hardly present the occasion for interference with the District Court's exercise of discretion. There can be no question but that appellant and his first counsel were aware of the seizure of the counterfeit bills from the steering column. The transcript of the July 12, 1972 conversation (T. 85-T. 87) fairly sings with that awareness. Thus, the Secret Service report which both appellant and counsel saw after the car was returned stated that Stoppiello had informed the Secret Service of the bills' location and that, thereafter, five counterfeit bills "were found concealed in the top portion of the steering

* Moreover, it is equally settled that a district court in treating the motion on its merits, as Judge Mishler has in this case, does not sacrifice its right to find the motion untimely. *United States* v. *Volkell, supra; United States* v. *Sheba Bracelets, Inc., supra; United States* v. *Maloney,* 402 F.2d 448, 449 (1st Cir. 1968), *cert. denied,* 394 U.S. 947 (1969).

column" (Government Exhibits 36 and 37, Government's Appendix, A. 28). Nor could it be said that appellant's recollection of that seizure, so vividly shown in the July 12 transcript, was not thereafter startlingly rekindled, for two days later he was arraigned on the instant indictment before Judge Dooling. During the ensuing year and a half, appellant made no motion whatever addressed to the legality of the search.

That failure continued through the commencement of trial and into the third trial day. It continued despite the fact that in November of 1973, at his trial in the Southern District, appellant, who was still represented by Mr. Rosenbaum, showed that he recalled his "hacks" and "trouble" with counterfeit money (Government's Appendix, A. 184). And it continued despite the fact that by mid-January his new counsel (see, *United States* v. *Bennett, supra*) had received transcripts of the July 12 conversation and, thereafter, on January 26, heard the tapes of that conversation. Under those circumstances, it was entirely appropriate for Judge Mishler to find that appellant's "motion in mid-trial, which incidentally would result in the forfeiture of the Government's right to appeal in the event of an adverse ruling, is untimely" (831). More certainly, there was no abuse of discretion.

POINT II

The District Court properly determined that the search of appellant's car was lawful.

Appellant challenges the constitutionality of the search of his automobile two months after its seizure as violative of the Fourth Amendment protections against unreasonable searches and seizures. The crux of his argument seems to be the narrow assertion that, when the agents first seized the car, they did not have probable cause to believe that there presently was contraband in the automobile. Consequently, he argues the subsequent search two months

later was tainted by the initial unlawful seizure. Appellant contends alternatively that, even if the appropriate standard for the seizure was the agents' reasonable belief that the vehicle had been used to "facilitate" the sale, then in progress, the government also lacked the necessary probable cause to seize the car.

The determination of whether the March 3rd search of appellant's car was valid depends upon whether, at that time, the car was lawfully in the custody of the Government under the forfeiture statutes, *i.e.,* Title 49 U.S.C. §§ 781 and 782. See *Cooper* v. *California,* 386 U.S. 58, 61-62 (1967); *United States* v. *Francolino,* 367 F.2d 1013, 1018-1022 (2d Cir. 1966); compare, *Preston* v. *United States,* 376 U.S. 364 (1964). Given that lawful custody, it is immaterial (1) that Agent Viggiano could feasibly have obtained a warrant prior to disassembling the steering column, see *United States* v. *Francolino, supra* at 1021 and cases cited therein;* (2) that there was a hiatus between the impoundment of the vehicle and the search, see *Cooper* v. *California, supra; United States* v. *Ayers,* 426 F.2d 524, 530 (2d Cir. 1970); *Burge* v. *United States,* 342 F.2d 408, 412, 414 (9th Cir. 1965); and (3) that the criminal complaint against appellant had, in the intervening period of time, been dismissed, see *United States* v. *Physic,* 175 F.2d 338, 339 (2d Cir., 1949): *United States* v. *One 1949 Lincoln Coupe Auto,* 93 F. Supp. 666, 669 (W.D. Mich., 1950); *One 1951 Cadillac Coupe De Ville,* 108 F. Supp. 286, 288 (W.D. Pa 1952).** The central issue, therefore, is whether the initial seizure of appellant's car was lawful.

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* To the extent that the actual search of appellant's car on March 3rd had to proceed upon probable cause, see *Cardwell* v. *Lewis,* — U.S. —, 94 S. Ct. 2464, 2470 (1974), it is not disputed that the information imparted by Stoppiello was entirely sufficient. See, *United* v. *Sultan,* 463 F.2d 1066, 1068 (2d Cir. 1972).

** On January 19, 1972, appellant was formally notified of the forfeiture proceedings (Government's Appendix, A. 24).

In the instant case, the initial seizure of appellant's automobile was justified on either of two grounds. Certainly, notwithstanding the absence of a warrant, it was properly taken from the street and, thereafter impounded as an incident to the undisputed lawful arrest of appellant. See *Cardwell* v. *Lewis,* — U.S. —, 94 S. Ct. 2464, 2471-2472 (1974); *Cady* v. *Dombrowski,* 413 U.S. 433, 446-447 (1973); *Chambers* v. *Maroney,* 399 U.S. 42, 52, n. 10 (1970). Thereafter ,when Stoppiello following his arrest, advised the agents that he had taken the counterfeit money from the car (See Government Exhibits 36 and 37, Government's Appendix, A. 22), the Secret Service properly instituted forfeiture proceedings through the Bureau of Customs. *Lockett* v. *United States,* 390 F.2d 168 172 (9th Cir. 1968).

Alternatively, the car was properly seized, at the outset, pursuant to the forfeiture statutes, 49 U.S.C. §§ 781 and 782.* It is clear that the agents were justified in believ-

* In pertinent part, those sections provide:

Section 781:

> "(a) It shall be unlawful (1) to transport, carry, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article."

Subsection (b)(2) of the section defines "contraband article" to include counterfeit money.

Section 782 implements the provisions of the foregoing section in the following manner:

> "Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited" [non-pertinent provisos excluded].

See also, Section 783, Title 49 U.S.C. [authorization to Secretary of the Treasury].

ing that the appellant's car as well as appellant, were playing a significant role in the transaction that was taking place. When Stoppiello went to his apartment building to pick up the counterfeit, Agent Reilly drove up to a nearby gas station to telephone his office. At the trial, Reilly testified that appellant followed him into the station, pulled up near the phone booth, and watched him closely as he made his call. When Reilly emerged from the phone booth, appellant got out of his car, walked towards him, and frisked him for sidearms. Thereafter, when Reilly drove out of the gas station and parked on a nearby street, appellant followed suit. He parked directly behind Reilly's car and watched the entire transaction from the front seat of his car. The Mustang served as his base of operations and his special vantage point throughout the transaction. Appellant's interest in the sale was obvious, based not only on his presence at the scene of the crime but on his suspicious behavior as well. Under these circumstances, combined with the agent's prior knowledge of appellant's involvement, it is difficult to see how they could not believe that appellant and his car were playing a significant role in the attempt sale. In short, the car was not being used simply for commutation. In substance, the seizure of the car was closely related to appellant's arrest and it was sufficient for the agents to believe that the car "had been used," *Lockett* v. *United States, supra,* at 172, to transport the contraband to the scene. See also *Sirimarco* v. *United States,* 315 F.2d 699, 701 (10th Cir.), *cert. denied,* 374 U.S. 807 (1963); *Drammond* v. *United States,* 350 F.2d 983, 988 (8th Cir. 1965); *Ted's Motor's* v. *United States,* 217 F.2d 777, 780 (8th Cir. 1954); *United States* v. *Edge,* 444 F.2d 1372 (7th Cir. 1971); *United States* v. *Haith,* 297 F.2d 65 (4th Cir. 1961), *cert denied,* 369 U.S. 804 (1962); *Howard* v. *United States,* 423 F.2d 1102, 1103 (9th Cir. 1970).

POINT III

The admission in evidence of the seized counterfeit bills, if error, was harmless.

Given the testimony of the witness Stoppiello as combined with the taped conversations between appellant and Stoppiello, it is clear that the admission in evidence of the five counterfeit bills was, if error, harmless. *Harrington* v. *United States*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967). Every aspect of Stoppiello's testimony was fully corroborated by the taped conversations and, indeed, the tapes alone would have been sufficient to convict. Proof of guilt, in short, was overwhelming and the admission in evidence of the seized bills was "superfluous." *United States* v. *Marrero*, 450 F.2d 373, 379 (2d Cir. 1971). See also, *Stone* v. *United States*, 435 F.2d 1402, 1406 (2d Cir. 1970); *United States* v. *Tucker*, 415 F.2d 867, 869 (2d Cir. 1969).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: November 1, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
LEE A. ADLERSTEIN,
Assistant United States Attorneys,
*of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Ruth E. Sobell and Ralph A. Peeples in the preparation of this brief. Ms. Sobell is a third year law student at Brooklyn Law School and Mr. Peeples is a second year law student at New York University Law School.

Form No. USA-52-6b
(Ed. 9-4-64)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

_____ being duly sworn,

deposes and says that he is employed in the office of _____

_____ United States Attorney for

the Eastern District of New York, attorney for the _____

herein.

That on the _____ day of _____ 19____, he did serve a true copy of

the hereto annexed _____

_____

on the office of _____

attorney for the _____ herein, located at _____

_____

Borough of _____, City of New York, by leaving a true copy of the same with the person in charge of said office, there being no one present who was authorized to give an admission of service.

_____

Sworn to before me this

_____ day of _____ 19____

Sir:

You will please take notice that a _____ *of which the within is copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.*

Dated, Brooklyn, New York _____ *19*____

Yours, etc.,

_____

United States Attorney,

Attorney for _____

To

_____

Attorney for _____

Sir:

Please take notice that the within _____ *will be presented for settlement and signature to the Honorable* _____ *at the office of the clerk,* _____

_____

Borough of _____ *City of New York, on the* ____ *day of* _____, *19* ____, *at* _____ *o'clock in the* ____ *noon, or as soon thereafter as counsel can be heard.*

Dated, Brooklyn, New York _____ *19*____

Yours, etc.,

_____

United States Attorney,

Attorney for _____

To

_____

Attorney for _____

Court Index No. 74-2124

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH MAURO,

Appellant.

BRIEF FOR THE APPELLEE

DAVID G. TRAGER

United States Attorney,
Attorney for USA

Due service of a copy of the within is hereby admitted.
New York, November 5, 19 74

Aaron R. Schacher

Aaron R. Schacher

Attorney for Appellant

To

Paul B. Bergman

Attorney for Appellee

Form No.

FPI—SS—8·21·68—20M—2601